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Riparian Rule Talking Points, Background, and Questions *- Draft May 20, 2014*

This is a working draft of overall topic areas and background needed to develop EPA talking points for the June 18-19 Environmental Quality Commission (EQC) meeting in Salem, OR and for the June 23 Board of Forestry (BOF). I have nested questions from DEQ and BOF and some preliminary responses in these topic areas.

I would suggest we come up with our talking points, then check if they are responsive to the questions. Then we can strategize what we want to present and what we want to have answers to in case we are asked.

Main Points

- *Speak to importance of protecting cold water for fish. Environmental Benefits to Riparian Rule and Need for Rule.*
- *EPA's Support of Riparian Rule for small and medium fish-bearing streams*

Topics:

Attachment 1: Importance of Protecting Cold Water: Temperature Guidance (John, Dru, NOAA, others)
Attachment 2: Environmental Benefits to Riparian Rule (All)
Attachment 3: Riparian Rule and Regulatory Authorities – WQS, TMDLs, CZARA (Rochelle, Jenny, Alan, Others)
Attachment 4: Where Riparian Rules Apply (Rochelle, Jenny, Alan, Others)
Attachment 5: RipStream and Paired Watershed Study (Peter, All)
Attachment 6: Additional Rulemaking for Type N Streams (?)

Att. 1: Importance of Protecting Cold Water: Temperature Guidance

Talking Points

- High water temperatures are a major factor harming salmon. Those endangered and threatened ESA salmonids, indeed all salmonids need cold water to survive. Numerous scientific studies completed over the last two decades, document the detrimental impacts to salmon and trout from high temperatures and the loss of cold water habitat. These studies indicate that high temperatures are a major factor contributing to salmon decline (*PNW Temp Guidance, p. 10*). The high quality, thermally optimal waters that do exist are likely vital for the survival of ESA-listed salmonids (*PNW Temp Guidance, 2003, p.32*).

Background on Temp Project. Knowing that high temperatures threaten and endanger salmonid species in Oregon, EPA undertook the Temperature Project from 2000-2003. EPA assembled an interdisciplinary team of water quality specialists, fish biologists, hydrologists, geomorphologists, ecologists, and other scientists from multiple agencies and organizations from the Pacific Northwest. The goal of the project was to use the most recent scientific studies to develop guidelines for establishing water quality standards for the protection of northwest salmon and trout. These guidelines incorporated the science of the salmon biology, behavior, and life history with the science of the thermal dynamics and structure of northwest streams and river to develop to determine what types of temperatures and thermal regimes salmon need to survive and thrive. Six scientific papers i synthesized information from hundreds of studies to provide the scientific and technical foundation for the Guidance. The papers and Guidance were reviewed by two independent, interdisciplinary scientific peer review panels.

- The Temperature Project concluded that the most important factors for salmon are cold water and a return to a natural thermal regime. The Temperature Guidance laid out a e mix of numeric and narrative criteria to serve as anchor points across a stream system to protect and restore the natural thermal regime.

- Two major assumptions were built into the WQS for temperature. The first major assumption of the temperature WQS is that water cools as you go upstream or put another way, water is colder in the headwaters and gradually warms as you move downstream. Sources of cold water such as headwater streams are integral to a functional natural thermal. The second major assumption, is that water cools as you progress seasonally from summer to winter/spring. In other words due to colder seasonal weather, cold water will be delivered during the late spring and early fall ("shoulder seasons") when salmonid spawning and fry emergence occurs.

- Based on these two assumptions the temperature guidance chose numeric temperature criteriafor the various life stages that were on the *higher* end of optimal, *assuming* that colder water occurs upstream and other times of the year, especially critical shoulder season months. The Guidance assumed that if you apply the numeric criterion to the lowest downstream extent of the use, the fish would have sufficient waters at optimal temperatures available upstream. So PCW and cold water in upstream areas is necessary for the numeric criteria to befully protective.

- Although EPA was challenged on our approval of DEQ's temperature WQS, EPA prevailed in 2012 on the numeric water quality standards because of how the temperature standard worked as a whole

to restore the natural thermal regime. Cold water delivered downstream spatially and seasonally was key to the U.S. District Court upholding the biological basis behind the numeric criteria.

- Existing cold water helps ensure that downstream temperatures are able to meet standards.

- With climate change raising stream temperatures and thus reducing salmon habitat, protecting areas with cold water is even more critical.

Ex. 5 - Deliberative

Other Background for Responses
***What ODEQ wants EPA to Address**: Construct behind PCW [answered above], Intent of the 0.3°C human use allowance, How anti-deg provision is intended to protect the natural thermal regime which protects the natural resources [answered above], the scientific underpinning for taking a NTP approach and how PCW fits into this construct [answered above]*
BOF: What is the biological basis of the PCW standard (BOF question) [*Answered above]*?

Att. 2: Environmental Benefits to Riparian Rule

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ODEQ: Clarification on how WA rule allowing for 2.8 degrees increase really applies to forestry
EPA: Temperature impairments, salmon studies, Oregon Plan, RipStream, CZARA

Att. 3: Riparian Rule and Regulatory Authorities (WQS, TMDLs, CZARA)

Talking Points

Water Quality Standards

- The goals of the Clean Water Act are to protect and restore our nation's waters. WQS standards apply to the waterbody, and therefore to all regulated sources, point and nonpoint.
- From WQS handbook (Jenny, do we need this background?):

  Water quality standards describe the desired condition of the aquatic environment, and, as such, reflect any activity that affects water quality. Water quality standards have broad application and use in evaluating potential impacts of water quality from a broad range of causes and sources and are not limited to evaluation of effects caused by the discharge of pollutants from point sources. In this regard, States should have in place methods by which the State can determine whether or not their standards have been achieved (including uses, criteria, and implementation of an antidegradation policy). Evaluating attainment of standards is basic to successful application of a State's water quality standards program.

- *Enforceability of controls under CWA is federally mandated only for PS; however states can and do enforce for PS. Without enforcement for all sources that contribute largely to a pollution problem WQS will not be attained, and waters will become more and more frequently listed and/or remain 303d listed.

- Briefly, OR's temperature standard was derived from EPA's Pacific Northwest Temperature Guidance (2003). This Guidance, in turn, was based upon hundreds of studies on salmonid life stages' biological thresholds for temperature—where injury and mortality are prevented in the target organism.
- Biologically-based pollutant criteria, including the temperature criteria, are chosen to be protective of the defined uses for the streams; in this case, to support an aquatic life use - fish. It does not make sense to choose criteria that do not protect the use or result in unacceptable mortality or injury to the use such that the goal cannot be achieved. The goals are to protect and restore the aquatic life populations as defined by State rules and approved by EPA.
- The temperature criteria identified in the guidance and adopted by Oregon work together to encompass the thermal complexity of streams.
- PCW was included by the State to meet several goals: added protection of stream thermal complexity including cold water refuges to offset criteria at the upper end of optimal; to meet antidegradation requirements or preservation of water of higher quality waters than the criteria; and protection of downstream waters, which must be considered pursuant to federal implementing regulations when criteria are established.
- While the numeric criteria are from the upper ends of the ranges found to be protective of the aquatic life uses, the protecting cold water narrative, and other narratives, enable such criteria to be fully protective, since fish are reliant on cold water areas ('refuges') for maintaining a healthy life cycle, and together, the criteria protect the bulk stream temperatures from being too warm in the

short and long term, so that fish can survive, but the colder waters enable the population as a whole to not only survive but to be self-propagating.

- [The State determines how and where it will apply its Riparian Rule for nonpoint sources, but it is consistent with the PCW WQS for the regions of the state thus far identified. Although EPA does not have all the information on how this is being implemented yet since OR is still developing its methods, from what we know, they do seem to overlap with the areas identified under the narrative use for protecting cold water. Although we do see the areas identified by the State as priorities for protection, we would encourage the state to consider the suite of criteria for which the riparian rules may be necessary (the PCW is just one of the temperature criteria that applies), and for other areas of the state where the science shows that the rules are necessary, as more information is developed. For antidegradation, the PCW provision is at least minimally consistent with the Clean Water Act antidegradation standard Tier 2 (waters of as or higher quality than criteria) requirements. It is also necessary for ensuring protection of downstream waters, as required by federal implementing regulations.
- Per Oregon's approved rule language that is in effect for CWA purposes, the PCW applies at the point of maximum impact where salmon, steelhead, and bulltrout are present. Waters can only be exempted from the provision if:
    - (A) There are no threatened or endangered salmonids currently inhabiting the water body;
    - (B) The water body has not been designated as critical habitat; and
    - (C) The colder water is not necessary to ensure that downstream temperatures achieve and maintain compliance with the applicable temperature criteria.
- There is no map of PCW currently adopted into standards – it is a narrative and applies to a subset of the mapped designated uses that were adopted into Oregon's regulations. The numeric temperature criteria apply where the associated uses have been designated in the maps adopted into Oregon regulations. There are year-round fish uses as well as spawning use maps for criteria that apply for specific times of year. There are typically two maps per basin unless no salmonid uses occur in a particular basin.
- Other aquatic life, beyond salmonids, are sensitive to temperature, however, OR identified salmonids as the most sensitive to temperature, and so salmonids (salmon, steelhead, trout, and bull trout) comprise the uses that currently designated in the maps for OR waters.
- Since the PCW criterion was deemed a component of the thermal regime temperature water quality standard necessary for protecting OR's uses, and is EPA-approved, it should be implemented as the State determines necessary for its waters to meet the State's water quality standards, and be consistent with the Clean Water Act and federal implementing regulations.

Other CWA Programs

- *TMDLS – reasonable assurance; WLAs; antideq;*

Other Background for Responses

BOF: What are the respective authorities/obligations on the issue of forest management and protecting water quality?

Answer: Water quality standards apply to the waterbody, not the regulated source. In terms of ensuring compliance with WQS, OR has the authority to regulate NPS in their state statutes, and ODEQ, in particular, has the authority to enforce the laws on OR's books. [something need to add that OR use sound science in making decisions about achieving WQS?]. Have to protect existing uses (add?).

TMDLs

CZARA

- Under the Coastal Zone Act Reauthorization Amendments of 1990, coastal states that participate in the voluntary National Coastal Zone Management Program are required to develop a Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) that describes the programs and enforceable mechanisms they will use to implement a suite of management measures to prevent and control polluted runoff in coastal waters. The goal of the Coastal Nonpoint Program is to ensure management measures are in place to achieve and maintain water quality standards and protect designated uses.
- EPA and NOAA jointly administer the Coastal Nonpoint Program and states must submit their coastal nonpoint programs to NOAA and EPA for approval.
- If EPA and NOAA find that a state has failed to submit an approvable program, the federal agencies must withhold a portion of the funding the state receives under Section 306 of the Coastal Zone Management Act, which supports implementation of the state's coastal management programs, including providing important funding and technical assistance to local communities, and Section 319 of the Clean Water Act which supports Oregon's statewide Nonpoint Source Program, including OWEB restoration grants and TMDL development.
- Oregon is one of eleven coastal states and territories participating in the National Coastal Zone Management Program that do not have fully approved coastal nonpoint programs. The 23 other states have received full approval for the coastal nonpoint programs.

- Include infor on the Czara award

1) As you likely know, EPA and NOAA announced our proposed finding that Oregon has failed to submit an approvable coastal nonpoint program for a 90-day public comment period this past December. Currently we are carefully reviewing all public comments and supporting documents received before making a final decision about the approvability of Oregon's program.

2) Of the 85 comments received, ** supported our proposed finding that Oregon had not submitted an approvable program while ** opposed the proposed decision. ** other commenters recognized that

Oregon needed to do more to protect coastal water quality, drinking water, and fish and wildlife habitat but did not feel withholding funding, as the statue requires, was the right approach.

3) NOAA and EPA are required to make a decision on the approvability of Oregon's Coastal Nonpoint Program at this time based on the terms of a settlement agreement with the Northwest Environmental Advocates. In 2009, they sued NOAA and EPA for failing to make a decision about Oregon's program. The settlement agreement originally stated that NOAA and EPA would make a final decision by May 15, 2014. Given the volume of comments received, the federal agencies are negotiating additional time. We are committed to making a final decision by January 30, 2015.

- EPA and NOAA jointly administer the Coastal Nonpoint Program (CNP), which is part of the …

As part of

Other Background for Responses

BOF: Does this riparian rule process relate to the NOAA/EPA proposal to disapprove the State of Oregon's coastal nonpoint pollution control program, if so, how? ***[will be answered above]***

4) ***In NOAA/EPA's December 20, 2013 proposed finding that the Oregon had failed to submit an approvable coastal nonpoint program, NOAA/EPA*** noted Oregon's program currently falls short in three areas related to water quality impacts from forestry, septic systems, and new development. Oregon must address these issues before NOAA and EPA can fully approve the state's coastal nonpoint program.

5) For example, related to forestry, before NOAA and EPA can fully approve Oregon's program, the state needs to adopt additional management measures for forestry that:

- provide better protection for small and medium sized fish bearing streams and non-fish bearing streams;
- protect landslide prone areas;
- more effectively address the impacts of forest roads, particularly legacy roads; and
- ensure adequate stream buffers for application of certain chemicals,

- While Oregon has made incremental progress in improving forest practices to protect water quality, numerous studies, some funded by the state, show that current forest practices are not sufficient to meet state water quality standards.
    - The studies indicate that current Oregon Forest Practices Act riparian buffers can result in increased stream temperatures above state water quality standards which are set to protect endangered salmon. The studies have also identified harmful impacts to salmon and water quality from forest roads and harvesting on high-risk landslide prone areas.

- By providing better protection for fish-bearing streams, the Riparian Rule will be very important for helping the state satisfy its remaining Coastal Nonpoint Program requirements.

- While NOAA and EPA may need to finalize its decision regarding the approvability of Oregon's Coastal Nonpoint Program before the BOF completes the riparian rule making process, the agencies will be tracking the process closely and the outcome of the rulemaking process will still likely have an impact on Oregon's Coastal Nonpoint Program.

- There are two main ways the rulemaking process will intersect with EPA/NOAA's decision process for Oregon Coastal Nonpoint Program:

    1) If, after carefully reviewing public comment and the state's March submission, NOAA/EPA's proposed decision stands and the federal agencies make a final finding that Oregon has failed to submit an approvable program, the new Riparian Rule will be critical in enabling the state to quickly address any lingering programmatic gaps, so that the state could reverse the "disapproval" decision without long-lasting impacts to its federal funding.

    2) If NOAA/EPA find that the State has established the necessary management measures for a fully approvable coastal nonpoint program, the agencies would need to issue another public notice on our proposed decision to fully approve Oregon's program and provide an opportunity for the public to comment on this proposed decision. The BOF's Riparian Rule making process would become part of the record for this action.

Is the concept of drafting the rule keyed on where the PCW standard has been established a legally defensible approach to meeting our Clean Water Act obligations? ***[Will be answered above]***

Att. 4: Where Riparian Rules Apply

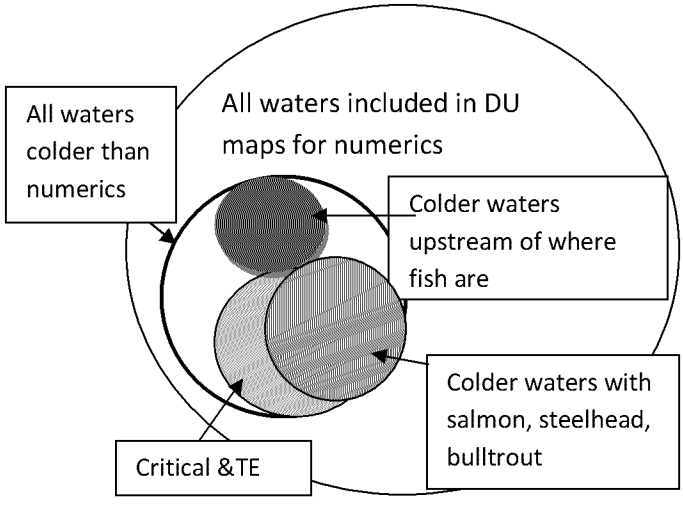
Oregon's Designated Uses and implementation of protecting cold water designated uses vs. the riparian rule mapping:

Talking Points

- We support the approach that the State is proposing on where the riparian rules should apply. [RL]
- We commend OR for using published and peer reviewed scientific data in guiding the application of its nonpoint source rules and BMPS.. [RL]
- We feel OR's application of the riparian rules is to the highest priority areas; however, we encourage OR to consider applying the rules more broadly to ensure restoration and protection of aquatic life. [RL]
- [Some language on how it might be consistent with the concepts of protecting cold water in temp guidance.]
- [Some language on how it supports an important part of the Coastal Nonpoint Program.]

Other Background for Responses

Protecting cold water conversation w/ODEQ)



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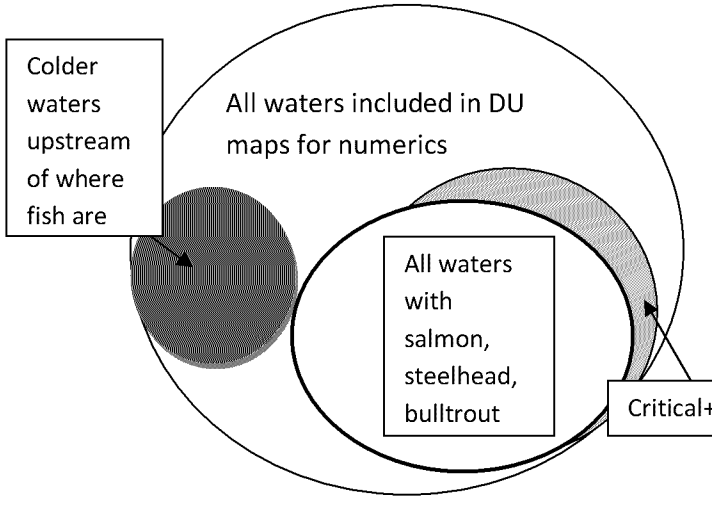

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Att. 5: RipStream and Paired Watershed Studies

The Paired Watershed study will be discussed. We will want to be somewhat informed regarding the findings from this study although Josh is going to present information to the EQC on this.

Talking Points

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Talking Points

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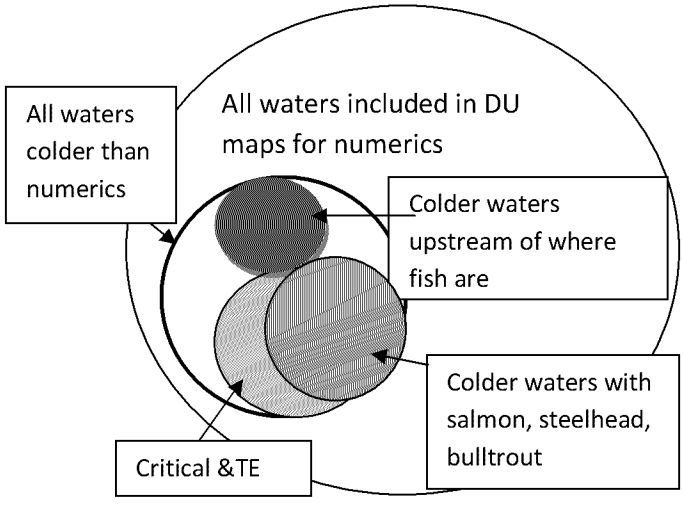

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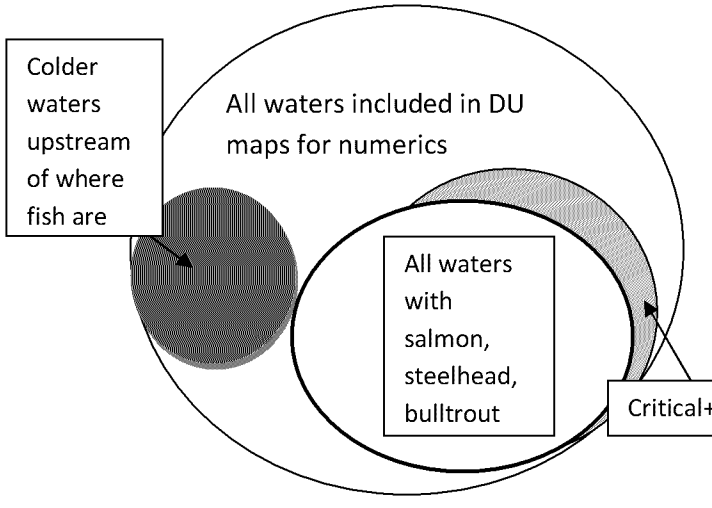

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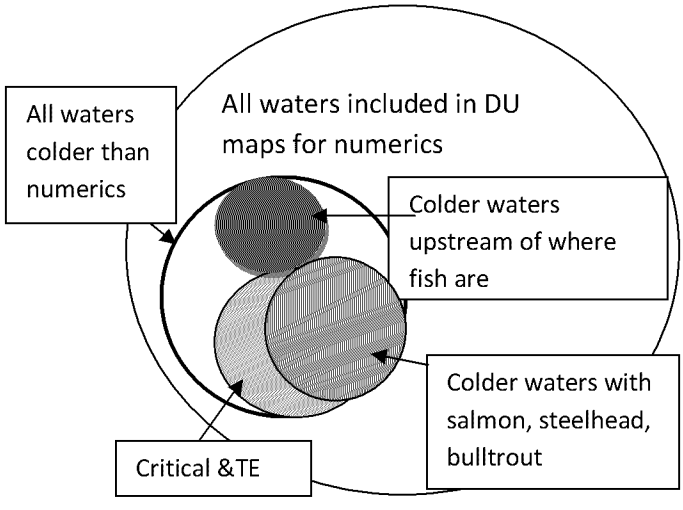

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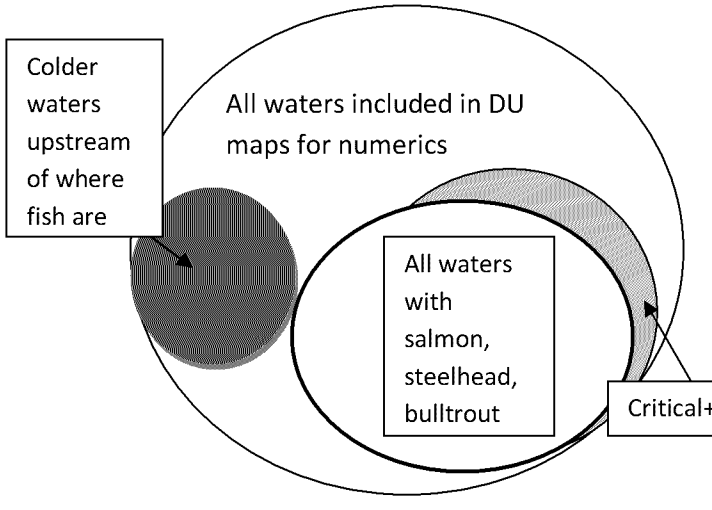

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short and long term, so that fish can survive, but the colder waters enable the population as a whole to not only survive but to be self-propagating.

- [The State determines how and where it will apply its Riparian Rule for nonpoint sources, but it is consistent with the PCW WQS for the regions of the state thus far identified. Although EPA does not have all the information on how this is being implemented yet since OR is still developing its methods, from what we know, they do seem to overlap with the areas identified under the narrative use for protecting cold water. Although we do see the areas identified by the State as priorities for protection, we would encourage the state to consider the suite of criteria for which the riparian rules may be necessary (the PCW is just one of the temperature criteria that applies), and for other areas of the state where the science shows that the rules are necessary, as more information is developed. For antidegradation, the PCW provision is at least minimally consistent with the Clean Water Act antidegradation standard Tier 2 (waters of as or higher quality than criteria) requirements. It is also necessary for ensuring protection of downstream waters, as required by federal implementing regulations.

Comment [R3]: As far as EPA understands the State's methodology

Comment [R4]: Need to confirm with JB/HQ

- Per Oregon's approved rule language that is in effect for CWA purposes, the PCW applies at the point of maximum impact where salmon, steelhead, and bulltrout are present. Waters can only be exempted from the provision if:
  - (A) There are no threatened or endangered salmonids currently inhabiting the water body;
  - (B) The water body has not been designated as critical habitat; and
  - (C) The colder water is not necessary to ensure that downstream temperatures achieve and maintain compliance with the applicable temperature criteria.

Comment [R5]: Protects waters colder than criteria during the summer

- There is no map of PCW currently adopted into standards – it is a narrative and applies to a subset of the mapped designated uses that were adopted into Oregon's regulations. The numeric temperature criteria apply where the associated uses have been designated in the maps adopted into Oregon regulations. There are year-round fish uses as well as spawning use maps for criteria that apply for specific times of year. There are typically two maps per basin unless no salmonid uses occur in a particular basin.
- Other aquatic life, beyond salmonids, are sensitive to temperature, however, OR identified salmonids as the most sensitive to temperature, and so salmonids (salmon, steelhead, trout, and bull trout) comprise the uses that currently designated in the maps for OR waters.
- Since the PCW criterion was deemed a component of the thermal regime temperature water quality standard necessary for protecting OR's uses, and is EPA-approved, it should be implemented as the State determines necessary for its waters to meet the State's water quality standards, and be consistent with the Clean Water Act and federal implementing regulations.

Other CWA Programs

- *TMDLS – reasonable assurance; WLAs; antideg;*

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~~The goals of the Clean Water Act are to protect and restore our nation's waters.~~

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~~Briefly, OR's temperature standard was derived from EPA's Pacific Northwest Temperature Guidance (2003). This Guidance, in turn, was based upon hundreds of studies on salmonid life stages' biological thresholds for temperature — where injury and mortality are prevented in the target organism.~~

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Comment [R6]: Bring copies

~~Biologically-based pollutant criteria, including the temperature criteria, are chosen to be protective of the defined uses for the streams; in this case, to support an aquatic life use – fish. It does not make sense to choose criteria that do not protect the use or result in unacceptable mortality or injury to the use such that the goal cannot be achieved.~~

~~The temperature criteria identified in the guidance and adopted by Oregon work together to encompass the thermal complexity of streams.~~

~~While the numeric criteria are from the upper ends of the ranges found to be protective of the aquatic life uses, the protecting cold water narrative, and other narratives, enable such criteria to be fully protective, since fish are reliant on cold water areas ('refuges') for maintaining a healthy life cycle, and together, the criteria protect the bulk stream temperatures from being too warm in the short and long term, so that fish can survive, but the colder waters enable the population as a whole to not only survive but to be self-propagating.~~

~~[The State determines how and where it will apply its Riparian Rule for nonpoint sources, but it is consistent with the PCW WQS.]~~

Comment [WJ7]: Rochelle, can you look at this and work on the language of how we answer the question: does the Riparian Rule meet WQS?

~~[Anti-deg language]~~

~~Per Oregon's approved rule language that is in effect for CWA purposes, the PCW applies where T&E species are present; areas upstream of where T&E species are present, and where critical habitat is present.~~

Comment [R8]: I am not speaking to where colder than since it is implicit in the name of the narrative

~~There is no map currently adopted into standards – it is a narrative use. The other temperature criteria apply to the designated use maps adopted into Oregon regulations. There are year-round fish uses as well as spawning use maps for criteria that apply for specific times of year. There are typically two maps per basin unless no salmonid uses occur in a particular basin. Other aquatic life, beyond salmonids, are sensitive to temperature, however, OR identified salmonids as the most sensitive to temperature, and so salmonids (salmon, steelhead, trout, and bull trout) comprise the use that is designated in the maps for OR waters. The other aspects of water quality standards that are relevant include OR's antidegradation policy in effect for Clean Water Act purposes. Before any degradation of a waterbody with water quality that is better than the criteria is allowed, federal regulations state that, "the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control." Further, under the federal regulations, any degradation that is allowed must still provide water quality sufficient to protect existing uses fully.~~

Comment [WJ9]: Rochelle, I'm going to let you take a crack at this. This is again related to BOF's question of whether the Riparian Rule meets WQS obligations. Let me know if you want to talk more.

~~**we could also show Dan Isaak model or Tim Beechie output, and speak to colder waters as a hedge against climate change and the fact that colder waters could be most impacted..~~

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Other Background for Responses

BOF: What are the respective authorities/obligations on the issue of forest management and protecting water quality?

Answer: Water quality standards apply to the waterbody, not the regulated source. In terms of ensuring compliance with WQS, OR has the authority to regulate NPS in their state statutes, and ODEQ, in

particular, has the authority to enforce the laws on OR's books. [something need to add that OR use sound science in making decisions about achieving WQS?]. Have to protect existing uses (add?).

TMDLs

CZARA

- ~~The Coastal Zone Management Act of 1972 (CZMA) established a program for states to voluntarily develop comprehensive programs to protect and manage coastal resources. To receive federal approval and implementation funding, States had to demonstrate that they had programs including enforceable policies that were sufficiently comprehensive and specific both to regulate land uses, water uses, and coastal development and to resolve conflicts between competing uses. In addition, the states had to have authorities to implement the enforceable policies.~~
- ~~The Coastal Zone Act Reauthorization Amendments of 1990 (CZARA) specifically charged State coastal programs, as well as State nonpoint source programs, with addressing nonpoint source pollution affecting coastal water quality. Section 6217 of CZARA ("Protecting Coastal Waters") provides that~~
- Under the Coastal Zone Act Reauthorization Amendments of 1990, coastal states that participate in the voluntary National Coastal Zone Management Program are required to develop a Coastal Nonpoint Pollution Control Program (or Coastal Nonpoint Program) that describes the programs and enforceable mechanisms they will use to implement a suite of management measures to prevent and control polluted runoff in coastal waters. The goal of the Coastal Nonpoint Program is to ensure management measures are in place to achieve and maintain water quality standards and protect designated uses.
- EPA and NOAA jointly administer the Coastal Nonpoint Program and states must submit their coastal nonpoint programs to NOAA and EPA for approval.
- If EPA and NOAA find that a state has failed to submit an approvable program, the federal agencies must withhold a portion of the funding the state receives under Section 306 of the Coastal Zone Management Act, which supports implementation of the state's coastal management programs, including providing important funding and technical assistance to local communities, and Section 319 of the Clean Water Act which supports Oregon's statewide Nonpoint Source Program, including OWEB restoration grants and TMDL development.
- Oregon is one of eleven coastal states and territories participating in the National Coastal Zone Management Program that do not have fully approved coastal nonpoint programs. The 23 other states have received full approval for the coastal nonpoint programs.

- ~~EPA and NOAA jointly administer the Coastal Nonpoint Pollution Control Program (CNP) provided under Section 6217 of CZARA. Each Coastal State participating in the CNP must develop and submit~~

Comment [AC10]: Not quite right…blending czm and cnp here. Let's stick with the background bullets we deveLed for the rollout/Hill briefing in Dec that have already been well vetted.

Comment [AC11]: Confirm that this is true.

~~a CNP Control Program to NOAA/EPA for review and approval/disapproval action. The State's CNPCP must contain~~

- Include infor on the Czara award
- ~~In 1998 NOAA/EPA issued a conditional approval of Oregon CNP subject to the development of additional management measures, many of which Oregon has addressed. However, some of the management measures still need to be addressed. The additional management measures need to address greater protections for forestry related issues, on site waste water disposal and storm water from new development.~~

1) As you likely know, EPA and NOAA announced our proposed finding that Oregon has failed to submit an approvable coastal nonpoint program for a 90-day public comment period this past December. Currently we are carefully reviewing all public comments and supporting documents received before making a final decision about the approvability of Oregon's program.

2) Of the 85 comments received, ** supported our proposed finding that Oregon had not submitted an approvable program while ** opposed the proposed decision. ** other commenters recognized that Oregon needed to do more to protect coastal water quality, drinking water, and fish and wildlife habitat but did not feel withholding funding, as the statue requires, was the right approach.

3) NOAA and EPA are required to make a decision on the approvability of Oregon's Coastal Nonpoint Program at this time based on the terms of a settlement agreement with the Northwest Environmental Advocates. In 2009, they sued NOAA and EPA for failing to make a decision about Oregon's program. The settlement agreement originally stated that NOAA and EPA would make a final decision by May 15, 2014. Given the volume of comments received, the federal agencies are negotiating additional time. We are committed to making a final decision by January 30, 2015.

- ~~In 2009 NWEA file suit~~EPA and NOAA jointly administer the Coastal Nonpoint Program (CNP), which is part of the …

As part of

~~The Riparian Rule will be useful to address a deficiency identified in EPA and NOAA's proposed notice of intent to disapprove Oregon's Coastal Nonpoint Program. The~~

Other Background for Responses

BOF: Does this riparian rule process relate to the NOAA/EPA proposal to disapprove the State of Oregon's coastal nonpoint pollution control program, if so, how? ***[will be answered above]***

4) ***In NOAA/EPA's December 20, 2013 proposed ~~decision~~ finding that ~~document to disapprove~~ the ~~State~~Oregon had failed to submit an approvable coastal nonpoint program, ~~of Oregon's Coastal Non-point Pollution Control Program,~~ NOAA/EPA ~~i~~*** noted Oregon's program currently falls short in three areas related to water quality impacts from forestry, septic systems, and new development. Oregon must address these issues before NOAA and EPA can fully approve the state's coastal nonpoint program.

Comment [AC12]: Not sure what you mean here. OR receives no funding for CZARA these days. Congress hasn't appropriated funding for the CNP since 2009.

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Comment [AC13]: May be good to show how many commenters supported vs. opposed our decision to give weight to public sentiment.

Comment [AC14]:

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5) For example, related to forestry, before NOAA and EPA can fully approve Oregon's program, the state needs to adopt additional management measures for forestry that:

- provide better protection for small and medium sized fish bearing streams and non-fish bearing streams;
- protect landslide prone areas;
- more effectively address the impacts of forest roads, particularly legacy roads; and
- ensure adequate stream buffers for application of certain chemicals,

- While Oregon has made incremental progress in improving forest practices to protect water quality, numerous studies, some funded by the state, show that current forest practices are not sufficient to meet state water quality standards.
  - The studies indicate that current Oregon Forest Practices Act riparian buffers can result in increased stream temperatures above state water quality standards which are set to protect endangered salmon. The studies have also identified harmful impacts to salmon and water quality from forest roads and harvesting on high-risk landslide prone areas.

Comment [AC15]: Bring in specifics here?

- By providing better protection for fish-bearing streams, the Riparian Rule will be very important for helping the state satisfy its remaining Coastal Nonpoint Program requirements.

- While NOAA and EPA may need to finalize its decision regarding the approvability of Oregon's Coastal Nonpoint Program before the BOF completes the riparian rule making process, the agencies will be tracking the process closely and the outcome of the rulemaking process will still likely have an impact on Oregon's Coastal Nonpoint Program.

- There are two main ways the rulemaking process will intersect with EPA/NOAA's decision process for Oregon Coastal Nonpoint Program:

  1) If, after carefully reviewing public comment and the state's March submission, NOAA/EPA's proposed decision stands and the federal agencies make a final finding that Oregon has failed to submit an approvable program, the new Riparian Rule will be critical in enabling the state to quickly address any lingering programmatic gaps, so that the state could reverse the "disapproval" decision without long-lasting impacts to its federal funding.

  2) If NOAA/EPA find that the State has established the necessary management measures for a fully approvable coastal nonpoint program, the agencies would need to issue another public notice on our proposed decision to fully approve Oregon's program and provide an opportunity for the public to comment on this proposed decision. The BOF's Riparian Rule making process would become part of the record for this action.

- ~~*dentified that the State needed additional management measures backed by enforceable authorities to address issues related to: a) on-site waste water disposal, b) storm water discharges from new development, and c) forestry. In addition, NOAA/EPA asked for public comments on the adequacy of existing agricultural practice.*~~

~~*Regarding forestry, NOAA/EPA noted in their proposed decision document that State had not demonstrated it has management measures, backed by enforceable authorities in place to : 1) protect riparian areas for medium and small fish bearing streams and non-fish bearing (type-N) streams; 2) protect high-risk landslide areas; 3) address the impacts of forest roads, particularly on so called "legacy" roads and 4) ensure adequate stream buffers for the application of herbicides, particularly on type "N" streams.*~~

~~*NOAA/EPA are currently reviewing the 85 comment letters and over 800 documents submitted during the public comment period on our proposed disapproval decision. While timing of BOF's riparian rule making process and the final CZARA decision don't align, the ultimate BOF rule changes are critical since the need for additional management measures for better buffer protections was identified in NOAA/EPA's 1998 initial review of the State's CNPCP and all subsequent reviews thereafter .*~~

~~*Programmatically, the intersection of the BOF's Riparian Rule process and NOAA/EPA's decision on Oregon's Coastal Non-point Pollution Control Program occurs in the following two different scenarios:*~~

~~*1) If, after review of the agencies' records and public comments received, NOAA/EPA find that the State has established the necessary management measures for an approvable CNPCP, the agencies's would issue a public notice on a proposed decision to approve the State's CNPCP and provide an opportunity for the public to comment on this decision. The BOF's Riparian Rule making process would become part of the record for this decision action.*~~

~~*2) If NOAA/EPA make a final decision to not approve the State's CNPCP, the new Riparian Rule would be considered in any subsequent review of the agencies' disapproval decision. A disapproval decision would be made if the State fails to demonstrate that it has established adequate management measures to address all of the concerns related to a-c above, and possibly ag, as well.*~~

Is the concept of drafting the rule keyed on where the PCW standard has been established a legally defensible approach to meeting our Clean Water Act obligations? ***[Will be answered above]***

Att. 4: Where Riparian Rules Apply

Oregon's Designated Uses and implementation of protecting cold water designated uses vs. the riparian rule mapping:

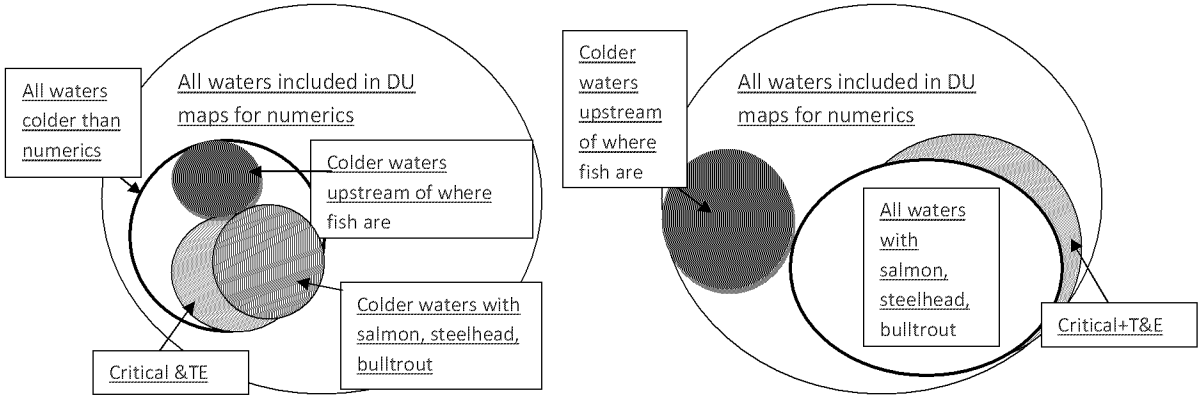
Talking Points

- We support the approach that the State is proposing on where the riparian rules should apply. [RL]
- We commend OR for using published and peer reviewed scientific data in guiding the application of its nonpoint source rules and BMPS.. [RL]
- We feel OR's application of the riparian rules is to the highest priority areas; however, we encourage OR to consider applying the rules more broadly to ensure restoration and protection of aquatic life. [RL]
- [Some language on how it might be consistent with the concepts of protecting cold water in temp guidance.]
- [Some language on how it supports an important part of the Coastal Nonpoint Program.]

Comment [R16]: So far as we understand their process and that it appears consistent with PCW EPA-approved criterion. However, we would encourage the state to consider the full suite of criteria and uses for which the science says riparian rules need to be adjusted.

Other Background for Responses

Protecting cold water *ODEQ application of riparian rules (per conversation w/ODEQ)*



BOF: How do ODF and DEQ identify the geographic extent of the Protecting Coldwater Criterion, including where throughout the state (including eastern Oregon) the PCW standard is in force? [State answer] How far upstream of reaches covered by the PCW standard should any riparian rule be applied to ensure we're not sabotaging our ability to meet the standard?

Att. 5: RipStream and Paired Watershed Studies

The Paired Watershed study will be discussed. We will want to be somewhat informed regarding the findings from this study although Josh is going to present information to the EQC on this.

Talking Points

Other Background for Responses

Att.6: Additional Rulemaking for Other Streams

Talking Points

Other Background for Responses

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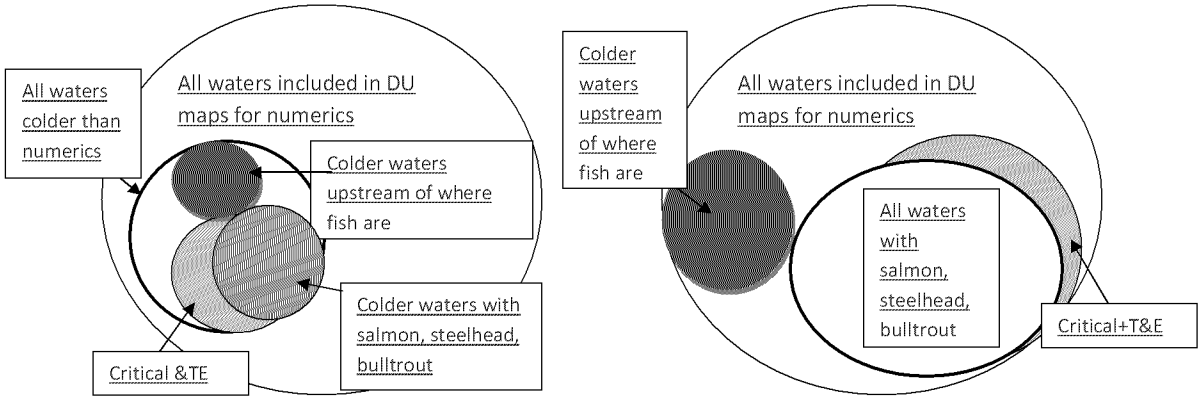
- [Some language on how it might be consistent with the concepts of protecting cold water in temp guidance.]
- [Some language on how it supports an important part of the Coastal Nonpoint Program.]

Comment [R17]: Sound science?

Other Background for Responses

Protecting cold water *ODEQ application of riparian rules (per conversation w/ODEQ)*



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Talking Points

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Other Background for Responses

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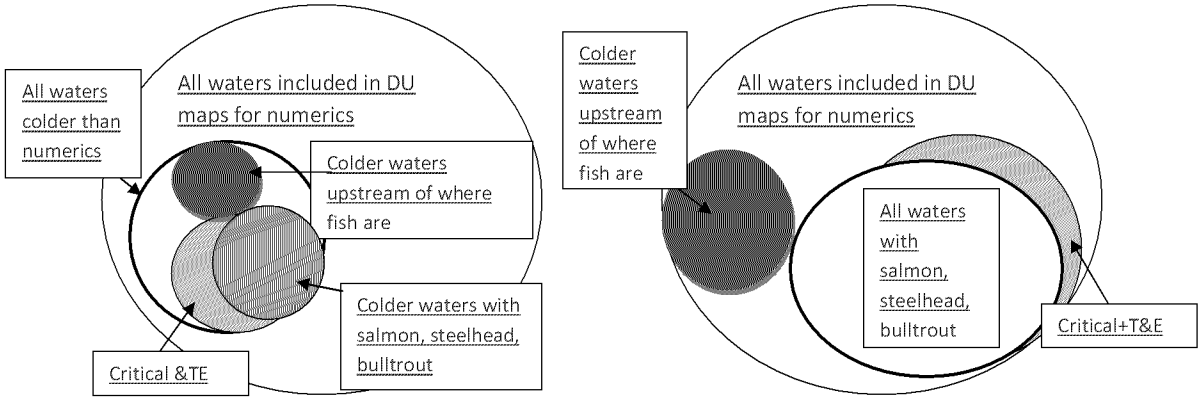

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